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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

GIANFRANCO MARCHESIELLO, Plaintiff and Appellant, v. ALLSTATE INSURANCE COMPANY, Defendant and Respondent.	A138631 (Marin County Super. Ct. No. CIV 1000515)
GIANFRANCO MARCHESIELLO, Plaintiff and Appellant, v. JPMORGAN CHASE BANK, N.A., Defendant and Respondent.	A138634 (Marin County Super. Ct. No. CIV 1000515)

These consolidated appeals arise out of an action against a lender and an insurance company following a house fire that rendered the residence uninhabitable. The homeowner asserted various causes of action against the lender based upon a claim that it changed the locks without authorization and deprived the homeowner's family of access to the property for a period of time while the residence was uninhabitable. The homeowner asserted similar claims against the insurer of the property and also alleged that it breached the terms of the insurance policy and acted in bad faith in responding to the homeowner's insurance claim.

On appeal from summary judgments in favor of the lender and the insurance company, plaintiff Gianfranco Marchesiello contends that the trial court erred because there are triable issues of material fact that preclude entry of judgment as a matter of law. We reject this contention and shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Property and the Fire

As of March 2009, Gianfranco Marchesiello resided at his mother's house in Larkspur, where he operated a small taxicab business out of a shed at the rear of the property. He was in the process of remodeling the house at the time, including installing a new furnace. His mother, Lea, had gone to stay with her daughter in Sacramento while the furnace was being replaced. On March 30, 2009, an accidental fire caused substantial damage to the house and rendered it uninhabitable.

Lea Marchesiello was the trustee of the Marchesiello Trust, which held legal title to the Larkspur property. As trustee, Lea Marchesiello took out a $1.63 million loan in 2006 from Washington Mutual Bank that was secured by a deed of trust recorded against the property. After Washington Mutual Bank went into receivership in 2008, defendant and respondent JPMorgan Chase Bank, N.A. (JPMorgan Chase) acquired the Marchesiello loan.

Lea Marchesiello died in February 2011. Her son, Gianfranco, became the trustee of the Marchesiello Trust following Lea's death. Because Gianfranco is the sole plaintiff in the action below and is pursuing the action individually, on behalf of his mother's estate, and as trustee of the Marchesiello Trust, for purposes of simplicity we will hereafter refer to him in this opinion (in his various capacities) as "Marchesiello" unless the context requires further specificity.

Securing the Dwelling

Shortly after the fire, Marchesiello and his mother caused emergency repairs to be performed at the property, including the installation of a new exterior entry door and deadbolt lock. Marchesiello returned to the property on an almost daily basis between March and June 2009.

As part of its customary business practice, JPMorgan Chase hired a property preservation company, Lender Processing Service, Inc. (LPS) to secure the property. On July 25, 2009, almost four months after the fire had rendered the residence uninhabitable, LPS conducted a routine inspection of the property. It posted a notice on the door reflecting that it had inspected the property and had "found it to be vacant or abandoned." The notice stated that the mortgagee, JPMorgan Chase, had "the right and duty to protect [the] property" and accordingly would "have the property secured and/or winterized within the next few days." Marchesiello saw the LPS notice attached to the front door. He also acknowledged that, based upon a review of photos of the property taken during July and August 2009, the property was missing windows and walls, had gaps in the fence, and could be accessed without going through the perimeter gate. At the time, the property remained completely uninhabitable. There was no electricity, gas, or water service at the property, and the stove, refrigerator, and dishwasher were missing. In addition, there were health hazards at the property such as mold.

In about July or August of 2009, the lock to the front entry door was changed, the residence was boarded up for protection, and a padlock was installed on the perimeter gate. Despite the existence of the locks and boarded-up windows, Marchesiello was still able to access the property by climbing over a fence and removing plywood boards installed over the windows to access any remaining tools he had in his backyard shed.

According to Marchesiello, he and his mother were not provided with keys to the new locks until around June 2010. When asked about efforts to find out who changed the locks, Marchesiello testified that he called his own claims adjusters, asked them who changed the locks, and when they did not give him an answer, he responded that he was not "going to do anything [about it] right now." Marchesiello claimed that his mother sent a letter to JPMorgan Chase in August 2009 asking for the keys and requesting assistance. Marchesiello has pointed to no evidence that the letter, which was addressed to the chairman of JPMorgan Chase in New York, was actually received or

acknowledged by JPMorgan Chase. Marchesiello could not say why he did not simply call a locksmith and have the locks changed himself.

The Insurance Policy

At the time of the fire, defendant and respondent Allstate Insurance Company (Allstate) insured the property under a deluxe homeowners policy. The policy provided three types of coverage that are relevant here: (1) dwelling structure protection, (2) personal property (contents) protection, and (3) compensation for additional living expense (ALE). The policy provided the following limits of liability for the types of coverage at issue here: $874,000 for the dwelling structure and $655,500 for contents, less applicable deductibles.

Under the policy's coverages for the dwelling structure and contents, Allstate was initially responsible for the actual cash value of damaged property—in other words, Allstate would make a deduction for depreciation in arriving at the amount owed. However, the policy allowed for an additional payment for costs in excess of actual cash value if the policyholder repaired the dwelling or replaced covered personal property within one year after receipt of the actual cash value payment.

The ALE coverage obligated Allstate to pay "the reasonable increase in living expenses necessary to maintain [the policyholder's] normal standard of living" following a covered loss. In a case in which the policyholder did not permanently relocate following a covered loss, ALE coverage was limited to the time required to repair the property or 12 months, whichever was shorter.

Dwelling Structure Claim

The day after the fire, Allstate claims adjuster Bob U'Ren inspected the property and discussed the claim process with Marchesiello. U'Ren was assigned to handle the structure claim. Within a few days after the fire, Marchesiello had retained a public adjuster, Consolidated Adjusting, Inc. (Consolidated Adjusting) to handle the claim on the family's behalf. Within two months of the fire, Allstate provided Consolidated Adjusting with a preliminary scope of repair performed by Mark Scott Construction, a licensed general contractor. The full cost of the repair was estimated at $462,524.91.

With an adjustment for depreciation, the actual cash value of the loss was estimated at $394,753.32. Allstate issued a check in that amount to Consolidated Adjusting on June 19, 2009. Allstate's claims adjuster explained that Mark Scott Construction was obtaining additional subcontractor bids and that, once he received a revised estimate, Allstate would pay any increase in the actual cash value of the loss.

Marchesiello's public adjuster, Consolidated Adjusting, refused to let Mark Scott Construction perform fire repairs, ostensibly because the contractor's headquarters in Fairfield were located too far away from the property. Consolidated Adjusting also claimed to have evaluated the loss to the structure at between $750,000 and $1 million. In response, Allstate's claims adjuster reiterated that Mark Scott Construction's estimate was preliminary and would be updated as necessary based upon subcontractor bids and additional costs identified after demolition had exposed the full extent of the fire damage. By letter dated July 3, 2009, Allstate's claim adjuster stated that Consolidated Adjusting had indicated that its contractor was in the process of completing an estimate on the damage. Allstate noted that it had been over 90 days since the loss and that any estimate from Consolidated Adjusting should be produced immediately for Allstate's review.

Over the next few months, Allstate worked with Mark Scott Construction to update the repair estimate as more information became available. On September 22, 2009, Allstate's claims adjuster provided Consolidated Adjusting with a revised repair estimate from Mark Scott Construction for the dwelling structure totaling $559,171.93. Subtracting for depreciation, the actual cash value of the loss was estimated at $491,600.39. Allstate transmitted to Consolidated Adjusting a payment of $96,847.07, representing the additional actual cash value associated with the structure loss.

On September 28, 2009, Consolidated Adjusting responded in a letter to Allstate's revised repair estimate. Consolidated Adjusting found the "scope of repair is deficient" but did not explain in what manner it was deficient. Enclosed with the letter was a competing repair estimate from its own contractor, Baycor Builders, in the amount of $743,489. Upon receiving the competing repair estimate, Allstate's claims adjuster contacted Consolidated Adjusting to discuss why the two estimates differed. In late

October 2009, Consolidated Adjusting stated in a letter that it was getting yet another estimate from a local contractor, Plath Construction, and that the estimate would be provided to Allstate "in the next few weeks." Consolidated Adjusting took the position that, after the Plath Construction estimate was provided, the parties could "[t]hereafter . . . discuss the best way to proceed to resolve this portion of the claim . . . ."

More than two months later, on January 7, 2010, Consolidated Adjusting submitted its promised estimate from Plath Construction. The repair estimate totaled $1,083,381.[1] After reviewing the Plath Construction estimate, Allstate's claims adjuster contacted Consolidated Adjusting to discuss why the various repair estimates differed. In response, Consolidated Adjusting withdrew the estimate from Baycor Builders and stated it would invoke the right to an appraisal.

On January 31, 2010, Consolidated Appraisal demanded appraisal of the structure claim. The appraisal panel ultimately issued its final award in September 2010. The panel appraised dwelling repairs at a replacement cost of $872,690.96, with an actual cash value of $813,389.84. The appraisal also included amounts for appurtenant structures and landscaping. After crediting for prior payments, Allstate remitted payment for the balance due of $350,267.98 on November 1, 2010. All told, Allstate paid over $900,000 to repair the damage to the dwelling.

Contents Claim

Allstate claims adjuster Catherine Smith handled the Marchesiellos' personal property claim. Shortly after the fire, she visited the property, discussed the claim with the Marchesiellos, and provided them with a $20,000 advance from the policy's contents coverage to assist with immediate personal property needs.

In early April 2009, Allstate's claims adjuster retained Kirby & Associates to prepare an inventory and value the personal property loss. Marchesiello's public

[1]It does not appear that any adjustment was made in the repair estimates prepared by Baycor Builders and Plath Construction to account for depreciation in order to arrive at an actual cash value for the structure loss.

adjuster, Consolidated Adjusting, thereafter confirmed that it had retained Kirby & Associates separately to prepare an inventory of personal property.

In late April 2009, Allstate received a contents inventory from Kirby & Associates. Allstate requested that Consolidated Adjusting direct the Marchesiellos to review the list and provide the ages of the items as well as their values as of the time they were originally purchased. Allstate's claims adjuster contacted Consolidated Adjusting in June, September, and November of 2009 to inquire about the status of the personal property inventory. Ultimately, Consolidated Adjusting sent Allstate a personal property inventory in December 2009 that contained a valuation of destroyed or damaged personal property in excess of $1.1 million. The estimated actual cash value of the loss was $888,351.15.

In February 2010, Allstate's claims adjuster sent Lea Marchesiello a letter enclosing a check for $459,734.95, representing the actual cash value amount of damaged or destroyed personal property less an adjustment for advances and previous payments. Allstate listed the full cost of repair or replacement as $735,643,19, with an actual cash value of $444,951.96. The letter refers to an enclosed "personal property damage estimate" that "further explains the loss," although the record before this court contains no such document.

Additional Living Expense (ALE) Claim

Allstate assigned claims adjuster Karen Arce to handle the Marchesiellos' claim for additional living expense (ALE) benefits. Shortly after the fire, Allstate's claims adjuster sent Lea Marchesiello a letter confirming that Allstate would pay the "reasonable increase in living expenses necessary to maintain your normal standard of living" for up to 12 months or the time required to repair the property, whichever was less.

Approximately one month later, a representative from a company known as Temp Homes contacted Allstate's claims adjuster and reported that Consolidated Adjusting had sought help locating housing for Marchesiello and his mother. Allstate began paying Temp Homes directly for housing for the period from June 2009 through December 2009.

In September 2009, Allstate's claims adjuster spoke with a representative from Dimont & Associates, a company retained by JPMorgan Chase, who informed Allstate that the Marchesiello home was in foreclosure. Allstate's claims adjuster requested the date and amount of Lea Marchesiello's last mortgage payment. In mid-October 2009, Allstate's claims adjuster spoke with an adjuster at Consolidated Adjusting, who informed Allstate that Lea Marchesiello had intentionally delayed making her mortgage payments because she was trying to negotiate a lower interest rate. Consolidated Adjusting explained that the strategy did not work and that all past due amounts had been paid. Allstate sought confirmation that the mortgage payments were current, explaining that ALE coverage only pays for *increased* living expenses, so that ALE payments would have to be reduced by the amount of the monthly mortgage payment that was not being paid.

In early November 2009, a representative from Dimont & Associates informed Allstate that the Marchesiello mortgage was past due from September 1, 2009. In a November 11, 2009 letter, Allstate requested documentation from Consolidated Adjusting confirming that the mortgage was current. Allstate never received any response to that letter.

By letter dated December 3, 2009, Allstate informed Consolidated Adjusting that it would have to stop its direct billing arrangement with Temp Homes starting January 3, 2010, in light of the fact that monthly mortgage payments were not being made. Allstate did not state that ALE benefits were terminated. Rather, the letter informed Consolidated Adjusting that the policy would continue to reimburse the insured for the difference between the monthly mortgage payment and the cost of the furnished temporary accommodations. Further, the letter stated that, if the mortgage payments were shown to be current, Allstate would resume reimbursing the Marchesiellos up to the full amount they were incurring for rent. Allstate's letter reminded Consolidated Adjusting that there was a 12-month limit on ALE benefits.

Neither the Marchesiellos nor any of their representatives ever submitted to Allstate any request for reimbursement of any specific ALE expenses incurred during the months of January, February, and March 2010.

Procedural History

In the operative first amended complaint, Marchesiello asserted causes of action against JPMorgan Chase for forcible entry, forcible detainer, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract, breach of the implied covenant of good faith and fair dealing, and elder abuse. The gravamen of the causes of action against JPMorgan Chase is that it purportedly secured the property and changed the locks without authorization, depriving Marchesiello and his mother of access to their home and causing them emotional distress.

Marchesiello asserted causes of action for forcible entry, forcible detainer, intentional infliction of emotional distress, negligent infliction of emotional distress, and elder abuse against Allstate. The basis for these claims is the same purported lock-out attributed to JPMorgan Chase that deprived Marchesiello and his mother of access to the property. As to Allstate, Marchesiello also alleged causes for breach of contract and bad faith in connection with the handling of the insurance claim. He sought punitive damages against both Allstate and JPMorgan Chase.

JPMorgan Chase and Allstate each moved for summary judgment of the claims against them. The trial court issued separate orders granting JPMorgan Chase's and Allstate's summary judgment motions. Following entry of judgment, Marchesiello appealed the judgment in favor of Allstate in case number A138631, and he appealed the judgment in favor of JPMorgan Chase in case number A138634. At Marchesiello's request, we consolidated the two appeals for all purposes.

DISCUSSION

1. *Standard of Review*

We exercise independent judgment in reviewing an order granting summary judgment. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Summary judgment must be granted if all the papers and affidavits submitted, together with "all inferences reasonably deducible from the evidence" and uncontradicted by other inferences or evidence, show that "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Where, as here, the defendant is the moving party, he or she may meet the burden of showing that a cause of action has no merit by proving that one or more elements of the cause of action cannot be established. (See Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show the existence of a triable issue of material fact as to that cause of action. (*Ibid.*)

A plaintiff does not satisfy the burden to demonstrate the existence of a triable issue of material fact simply by listing facts that have some relationship to the dispute. "For practical purposes, an issue of *material* fact is one which, in the context and circumstances of the case, 'warrants the time and cost of factfinding by trial. . . .' [Citation.] In other words, not every issue of fact is worth submission to a jury. The purpose of summary judgment is to separate those cases in which there are *material* issues of fact meriting a trial from those in which there are no such issues." (*Sangster v. Paetkau*, *supra*, 68 Cal.App.4th at p. 162.) Moreover, a party cannot establish a triable issue of fact by citing information not identified in a separate statement of undisputed facts. (See *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 ["if it is not set forth in the separate statement, it does not exist"].)

2. *Lock-out Claims*

We begin by considering the causes of action arising out of the purported lock-out that allegedly deprived Marchesiello and his mother of access to the property and caused

them to suffer emotional distress. While many of these causes of action are alleged against both Allstate and JPMorgan Chase, it is apparent that the factual and legal claims primarily involve JPMorgan Chase and its actions. Accordingly, we initially address and dispense with the more limited claim against Allstate and then consider in more depth the specific causes of action alleged against JPMorgan Chase arising out of the lock-out.

A. Claims Against Allstate

The underlying basis for all of Marchesiello's lock-out claims is that some unidentified "defendants" deprived him and his mother of possession of their home and personal possessions by changing the lock on the front entry door and by installing a padlock on the fence to the property. In seeking summary adjudication on causes of action based on the lock-out, Allstate cited evidence that it had no involvement in changing any locks on the property. Allstate also cited Marchesiello's own testimony that he does not know who changed or added a lock to the property.

It is undisputed that Marchesiello was unaware who changed or added a lock to the property, but he purported to dispute whether Allstate had some involvement in adding or changing locks. The evidence he relies upon does not give rise to a factual dispute as to whether Allstate added or changed any locks. He cites a portion of the deposition of Bob U'Ren, one of Allstate's claims adjusters, who reported that a contractor was initially called out to the property to do a "board-up." The cited testimony does not mention anything about Allstate changing or adding locks. It is reasonable to infer that the contractor boarded up windows at the outset, but there is nothing to suggest Allstate had any reason to add or change locks at that time.

In the absence of any admissible evidence permitting a reasonable inference that Allstate was in some way involved in the claimed lock-out, Marchesiello's causes of action against Allstate arising out of the lock-out allegations necessarily fail. Accordingly, there was no error in granting summary adjudication in Allstate's favor on

the causes of action for forcible entry, forcible detainer, intentional infliction of emotional distress, and negligent infliction of emotional distress.[2]

B. Contract Claims

Marchesiello contends that JPMorgan Chase had no contractual right under the deed of trust to secure the property by adding or changing locks. His argument turns upon whether the property was "abandoned" within the meaning of the deed of trust. He contends there are triable issues of material fact as to whether he had abandoned the property at the time JPMorgan Chase's property preservation company, LPS, secured the property.

Under the deed of trust securing the Marchesiello loan, JPMorgan Chase had a contractual right to protect its interest in the property. Specifically, the deed of trust provides in pertinent as follows: "If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, . . . or (c) Borrower has *abandoned* the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property . . . , including . . . *securing* and/or repairing the Property. . . . Securing the property includes, but is not limited to, entering the Property to make repairs, *change locks*, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off." (Italics added.)

Here, the undisputed evidence established that the property was severely damaged, uninhabitable, and unsafe for occupancy. Nobody was residing in the house or on the property at the time the locks were changed, which occurred months after the fire. There were windows and walls missing and gaps in the fence. There were clear signs that the

[2]We observe that, although Marchesiello asserted a cause of action for elder abuse premised on the alleged lock-out, he has not challenged on appeal the trial court's decisions granting summary adjudication in favor of JPMorgan Chase and Allstate on that cause of action.

property was unsecured and at risk of further deterioration. To remove all doubt, LPS posted a notice on the front door before securing the property. In light of the deed of trust's stated purpose to protect the lender's interest in the property, it is not unreasonable to conclude that the property was abandoned within the meaning of the deed of trust under the circumstances presented here.

Marchesiello argues that mere non-use is insufficient to establish abandonment, and he claims there must be both an intention to abandon and an external act carrying out the abandonment. As support for this proposition, he cites a number of cases of ancient vintage arising primarily in the context of title to property. (See, e.g., *Lawrence v. Fulton* (1862) 19 Cal. 683, 688–691 [action for ejectment where court gave instruction on abandonment].) We are not persuaded that these authorities are necessarily germane to our interpretation of abandonment as that term is used in the deed of trust. JPMorgan Chase did not assert an abandonment to take title to the property or to permanently prevent Marchesiello from accessing or possessing the property. Rather, the determination that there was an abandonment resulted from the condition of the property and the need to protect the property from declining further in value.

While a property owner's intent as manifested by his or her actions plainly has some bearing upon whether property may be considered abandoned, JPMorgan Chase and its designated property preservation company, LPS, could not be expected to divine Marchesiello's claimed intent under the circumstances presented here. He contends his intent not to abandon the property is evidenced by a number of facts, including that he resided at the property before the fire, he spent weeks removing salvageable items of personal property, he had new locks installed immediately after the fire, he visited the property on an almost daily basis between March and June 2009, he climbed the fence and accessed the property even after it was secured by new locks, he filed an insurance claim, and he periodically requested the keys to the new locks. Even assuming these facts support an inference that Marchesiello did not intend to abandon the property, there

is no reason to believe that LPS would have been aware of Marchesiello's various actions. Instead, it made its determination based upon the condition of the property months after the fire, which plainly supported a conclusion that the property had been abandoned and needed to be secured in order to protect the lender's interest.

We conclude as a matter of law that JPMorgan Chase did not breach the deed of trust by securing the property and changing the locks. It had a contractual right to take those actions.

As for the cause of action for breach of the covenant of good faith and fair dealing against JPMorgan Chase, the implied covenant is limited to assuring compliance with a contract's express terms and does not impose substantive duties or limits beyond those incorporated in the agreement. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349–350; *Pasadena Live, LLC v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1093–1094.) Marchesiello does not explain in what manner JPMorgan Chase violated the covenant or identify some triable issue of material fact that distinguishes the claim from his breach of contract cause of action. Therefore, we conclude that his cause of action for breach of the covenant of good faith and fair dealing fails as a matter of law for the same reason that the undisputed facts do not support his breach of contract claim.

C. Forcible Entry and Forcible Detainer

Marchesiello alleged causes of action for forcible entry against JPMorgan Chase under subdivisions (1) and (2) of Code of Civil Procedure section 1159. In general, subdivision (1) of the forcible entry statute governs a situation in which a person violently enters upon real property by breaking open doors or windows, whereas subdivision (2) governs a situation in which a person enters real property peaceably and then removes or excludes the party in possession by means of force or threats. (Code Civ. Proc., § 1159.) Marchesiello also alleged a separate cause of action against JPMorgan Chase for forcible detainer under section 1160, subdivision (1) of the Code of Civil Procedure, which applies when a person unlawfully holds or keeps possession of

real property by "force . . . or by menaces and threats of violence . . . ." The forcible entry and detainer causes of action are premised upon the lock-out allegations previously described.

In order to recover for forcible entry, a plaintiff must show that "he was peaceably in the actual possession at the time of the forcible entry . . . ." (Code Civ. Proc., § 1172.) As a predicate to an unlawful detainer cause of action, a plaintiff must establish that he or she was "in the peaceable and undisturbed possession" of the property within five days of any unlawful entry. (Code Civ. Proc., § 1160.) California law has long recognized that these statutes must be strictly construed. (*House v. Keiser* (1857) 8 Cal. 499, 501.) Possession must be "actual, peaceable, and exclusive," and the mere "exercise of casual acts of ownership over the premises" does not suffice to establish possession. (*Ibid.*; see *Shusett, Inc. v. Home Sav. and Loan Assn.* (1965) 231 Cal.App.2d 146, 154.)

Here, the undisputed evidence established that Marchesiello and his mother did not actually and exclusively possess the property at the time the locks were changed or added. The property was uninhabitable and they were not living there. Other parties, such as contractors, had access to the property and Marchesiello only occasionally visited the property. Moreover, there is no evidence that Marchesiello and his mother were "occupants" of the property within the meaning of Code of Civil Procedure section 1160 immediately before the alleged acts of unlawful entry. Because the Marchesiellos did not actually possess the property at the time, they were not entitled to pursue forcible entry and detainer claims.

Further, as set forth above, JPMorgan Chase had a lawful, contractual right to change the locks and secure the property. The contractual right afforded to it under the deed of trust defeats a forcible entry or detainer cause of action. (Cf. *Shusett, Inc. v. Home Sav. and Loan Assn., supra,* 231 Cal.App.2d at p. 154 [defendant's lawful right to possess or enter property is fatal to forcible entry cause of action].)

Marchesiello claims it is irrelevant that the property was vacant and uninhabitable at the time of the forcible entry, citing *White v. Pfieffer* (1913) 165 Cal. 740. The case is distinguishable. There, a party who had no right to possession of a property obtained the keys from the owner for the ostensible purpose of inspecting it and proceeded to occupy the property. (*Id.* at p. 741.) Unlike the situation here, the property at issue in *White v. Pfieffer* was habitable. More importantly, the defendant in *White v. Pfieffer* had no right, contractual or otherwise, to possess the property. By contrast, as established in this case, JPMorgan Chase had a contractual right to secure the property under the deed of trust.

We conclude the trial court properly granted summary adjudication in favor of JPMorgan Chase as to the causes of action for forcible entry and detainer on the basis of the undisputed facts.

D. Negligent Infliction of Emotional Distress

Marchesiello alleged causes of action for intentional and negligent infliction of emotional distress against JPMorgan Chase. On appeal, he limits his arguments to the negligence cause of action and does not attempt to argue that the court erred in dismissing his cause of action for intentional infliction of emotional distress. We will consider any challenge to the intentional tort cause of action waived on appeal and will limit our discussion to the negligence cause of action.

"Negligent infliction of emotional distress is not an independent tort; it is the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply." (*Ess v. Eskaton Properties, Inc.* (2002) 97 Cal.App.4th 120, 126.) "[D]amages for severe emotional distress may be recovered 'when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a special relationship between the two.' " (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 890.) Absent a duty, there can be no breach and no negligence. (Cf. *Goldberg v. Frye* (1990) 217 Cal.App.3d 1258, 1267.)

In the trial court, Marchesiello acknowledged that he had to establish the existence of a duty owed by JPMorgan Chase. The duty he identified below was the "legal contractual duty" owed by JPMorgan Chase under the deed of trust that was purportedly violated when JPMorgan Chase's agent secured the property. In other words, his negligent infliction of emotional distress claim was founded upon the forcible entry and detainer. But, as we have already determined, JPMorgan Chase did not breach its contractual obligations under the deed of trust. There was no forcible entry or detainer as a matter of law. His negligence claim, which is founded upon the same duties underlying his contract claim, likewise fails.

On appeal, Marchesiello takes a different approach. He refers to the trial court's discussion of the intentional infliction of emotional distress cause of action where the trial court noted that JPMorgan Chase may have been "insensitive or maddeningly nonresponsive" but that its conduct did not rise to the level of outrageousness required to establish intentional infliction of emotional distress. Marchesiello seems to suggest that even though the conduct might not rise to the level of intentional infliction of emotional distress, it still may qualify as negligent infliction of emotional distress. Marchesiello's argument ignores the fact that he must first establish the existence of a duty as a predicate to a negligence cause of action. Further, the difference between negligent and intentional infliction of emotional distress is not simply a matter of the degree of outrageousness. Simply because JPMorgan Chase may have been nonresponsive does not support a cause of action for negligence.[3]

[3]It must be borne in mind that Marchesiello was able to access the property and his tools during the entire time he was purportedly locked out, when the property was uninhabitable. Indeed, he expressed to his own adjusters that he did not intend to take any action at the time he first learned of the lock-out. While he may have experienced some inconvenience in having to remove boards to access the house or other structures in order to gain access to the property, he was not prevented from taking those actions. Nor did anything prevent him from having the locks changed himself.

3. ***Allstate's Handling of the Insurance Claim***

Insurance policies are fundamentally just contracts and are subject to the same legal standards as any other contract. (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400.) To establish a breach of an insurance contract, a policyholder must establish his or her entitlement to a benefit the insurer refused to pay. (*First v. Allstate Ins. Co.* (C.D. Cal. 2002) 222 F.Supp.2d 1165, 1170.) It is axiomatic that an insurer does not breach its policy when it pays all benefits due on a claim. (See *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 944; *Maxwell v. Fire Ins. Exchange* (1998) 60 Cal.App.4th 1446, 1449.)

In order to establish liability for bad faith, or breach of the implied covenant of good faith and fair dealing, a plaintiff must establish not only that the insurer withheld benefits but also that the withholding of benefits was *unreasonable.* (*Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205.) Unreasonable conduct is not synonymous with an honest mistake, bad judgment, or even negligent claims handling. (See *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.) Instead, a plaintiff must show a "conscious and deliberate act" that frustrates a party's reasonable expectations and deprives the plaintiff of the benefits of the agreement. (*Ibid.*)

An insured cannot create a triable issue of fact as to bad faith simply by assembling a laundry list of complaints about the insurer's actions. (*Phelps v. Provident Life and Accident Ins. Co.* (C.D. Cal. 1999) 60 F.Supp.2d 1014, 1023–1024.) Further, the possibility that the insurer could have done a better job handling the claim is not indicative of bad faith. (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 351.) In evaluating the insurer's conduct, the court considers each decision as of the time it was made and not with the benefit of hindsight. (*Id.* at p. 347.)

With these principles in mind, we proceed to consider each of Marchesiello's claims.

A. Dwelling Structure Claim

Marchesiello contends that there is a triable issue of material fact as to whether Allstate acted in bad faith and unreasonably delayed settling the claim for dwelling repair costs. He takes issue with the trial court's conclusion that the issue could be decided as a matter on the basis of undisputed evidence that there was a genuine dispute concerning the cost of repairing the dwelling.

Under California law, an insurer cannot be liable for bad faith when there is a genuine dispute between the insurer and the insured as to the existence of coverage liability or the amount of the insured's coverage claim. (See *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724; *Rappaport-Scott v. Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831, 837.) " '[A] court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, so long as there existed a genuine issue as to the insurer's liability.' " (*Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1292.)

Marchesiello contends it was error to conclude that the undisputed evidence showed the existence of a genuine dispute over the repair costs. He asserts that Mark Scott Construction's estimate was unrealistically low, and he claims that Mark Scott Construction was biased in favor of Allstate because it was a "preferred vendor." These two asserted facts, however, were neither contained in any separate statement or supported by any evidence of which this court is aware. Our review is limited to the facts presented to the trial court that are contained in the separate statement of undisputed facts. (*Sangster v. Paetku, supra,* 68 Cal.App.4th at p. 163; *United Community Church v. Garcin, supra,* 231 Cal.App.3d at p. 337.)

Because Allstate's initial repair payment was based upon an estimate from an outside licensed contractor, that fact is indicative of good faith. (See *Chateau*

Chamberay Homeowners Assn. v. Associated Int'l Ins. Co., supra, 90 Cal.App.4th at pp. 347–348 [no bad faith liability where insurer reasonably relies on opinions of outside professionals].) Marchesiello has identified no evidentiary basis to support a conclusion that the Mark Scott Construction estimate was "unrealistically low" aside from the fact that it was less than the repair cost ultimately awarded by the appraisal panel. But the mere fact that an appraisal resulted in a net additional payment does not establish liability for bad faith. (See *Fraley v. Allstate Ins. Co., supra,* 81 Cal.App.4th at pp. 1291–1293.) When the parties "rely on expert opinions, even a substantial disparity in estimates for the scope and cost of repairs does not, by itself, suggest the insurer acted in bad faith." (*Id.* at p. 1293.)

The undisputed facts establish the existence of a genuine dispute regarding the scope of Allstate's contractual obligations. Allstate secured a repair estimate from a qualified, licensed general contractor within three months of the fire, and initially paid nearly $400,000. It paid nearly $100,000 more a few months later after it received a revised repair estimate. Marchesiello's public adjuster only then proposed a competing bid and sought additional time to present yet another bid, which took more than three months to secure. It was apparent from the parties' communications that there was significant disagreement on the scope of the needed repairs. Further, instead of trying to reconcile the estimates with Allstate, Marchesiello invoked the appraisal process, which ended up delaying a final settlement for many more months. We agree with the trial court's conclusion that the vast majority of the delay was due to the appraisal process and to the fact the public adjuster retained by the Marchesiellos did not provide a final repair estimate to Allstate until January 2010.

We conclude that, based upon the undisputed evidence, there was a genuine dispute concerning the amount of the repair costs due under the policy. Consequently, Allstate is not liable as a matter of law for bad faith as a result of any delay in fully settling the claim for the dwelling repair costs.

B. Contents Claim

Marchesiello also contends the trial court erred in granting summary adjudication on his contents claim, insisting there is a triable issue of fact concerning the actual cash value of his personal property. We disagree.

As an initial matter, in his response to Allstate's separate statement of undisputed facts, Marchesiello did not dispute Allstate's contention that it paid the actual cash value of the property's contents. Because he did not dispute that fact, the matter should have been at an end.

Marchesiello attempts to create a factual issue on appeal by arguing that the trial court mistakenly believed that Allstate accepted the estimate from a third-party vendor, Kirby & Associates, when in fact Allstate arrived at its own estimate of the actual cash value. He claims there is a triable issue of fact concerning whether the pre-depreciation value of the contents is $1,165,558.99, as set forth in the Kirby & Associates appraisal, or $735,643.19, as Allstate estimated.

Simply because there is a discrepancy between two estimates does not establish either that Allstate breached its obligation to pay for damaged contents or acted in bad faith. Marchesiello offers no basis for this court to conclude that the Allstate estimate was unreasonably low other than by comparing it to a competing estimate, which could just as easily have been unreasonably high. Indeed, the factual support for the competing estimates is not even included in the record before this court. Because Marchesiello has offered no evidence to raise a triable issue that Allstate's estimate was inadequate or unreasonable, his contents claim fails as a matter of law.

C. ALE Claim for Housing Expenses

Marchesiello contends there are triable issues of material fact as to whether his entitlement to ALE benefits for temporary housing was wrongfully terminated. As we explain, the claim lacks merit.

The thrust of Marchesiello's argument is that Allstate improperly discontinued ALE benefits three months before they were due to expire by relying upon a representation by one of JPMorgan Chase's agents, who reported that the property was in foreclosure in September 2009. Marchesiello contends the property was not in foreclosure and that Allstate failed to conduct an adequate investigation to determine for itself whether foreclosure proceedings were pending.

Marchesiello's characterization of the undisputed facts misses the mark. Allstate did not terminate ALE benefits.[4] Rather, it stopped making *direct* payments to a housing provider in light of evidence that Lea Marchesiello was not current in her mortgage payments. Allstate's claims adjuster explained that ALE coverage only compensates living expenses above what the insured would otherwise pay, so that if the insured was not paying the mortgage, the payments would have to be adjusted to account for the fact the insured had lower living expenses. Allstate also explained that it would continue to reimburse the insured for the difference between the monthly mortgage payment and the cost of furnished temporary accommodations, and would resume reimbursing the Marchesiellos up to the full amount they were incurring for rent if they demonstrated they were current in their mortgage payments. Despite Allstate's invitation to submit a claim for reimbursement for the last three months for which ALE benefits were available, it is undisputed that no such reimbursement request was made.

[4]Marchesiello contends there is a dispute as to whether ALE benefits were terminated, but the evidence offered by Marchesiello is a letter from Consolidated Adjusting, Marchesiello's own public adjuster, who referred to Allstate "stopping ALE payments" as of December 2009. The court sustained an objection to the letter as inadmissible hearsay. Further, the letter by Marchesiello's public adjuster mischaracterizes Allstate's position. The actual letter from Allstate is clear that only the *direct billing* arrangement with the housing vendor was being discontinued. Marchesiello cannot raise a triable issue of fact by claiming his own agent falsely described Allstate's letter to him.

The focus on whether the property was in foreclosure is misplaced. Allstate did not suspend direct payment of ALE benefits to a housing provider because the property was in foreclosure. Rather, it suspended direct payment because there was evidence that Lea Marchesiello was not current on her mortgage. It is irrelevant whether JPMorgan Chase was pursuing foreclosure. Further, the Marchesiellos' own public adjuster, Consolidated Adjusting, confirmed on different occasions that the mortgage was not current and that Lea Marchesiello had intentionally delayed making her payments to negotiate a lower interest rate. Allstate requested documentation from Consolidated Adjusting to confirm that the mortgage was current but received no response.

Marchesiello has identified no triable issue of fact that would suggest that Allstate prematurely terminated ALE benefits. Allstate's communications provided clear notification that the Marchesiellos were entitled to seek reimbursement for three additional months of ALE benefits. They simply chose not to do so.

Marchesiello also claims that Allstate unreasonably delayed paying ALE expenses incurred in April and May 2009 until December 2009. The record establishes that a claim for expenses incurred in April and May 2009 was submitted in July to the claims adjuster handling the structure claim. Although the request was entered in Allstate's system, it was not brought to the attention of the claims adjuster handling the ALE claim until December 2009, when Consolidated Adjusting sent a renewed request. These undisputed facts may reflect an honest mistake or negligent claims handling, but they do not establish unreasonable conduct amounting to bad faith. (See *Careau & Co. v. Security Pacific Business Credit, Inc.*, *supra*, 222 Cal.App.3d at p. 1395.) Marchesiello has not pointed to any facts that would support an inference that Allstate consciously or deliberately delayed reimbursing ALE expenses incurred in April and May 2009.

We conclude there is no triable issue of fact precluding judgment in favor of Allstate on the claim for ALE benefits.

4. ***Punitive Damages***

As a final matter, Marchesiello contends there are triable issues of material fact regarding whether he is entitled to punitive damages. In light of our conclusion that summary judgment was properly granted in favor of JPMorgan Chase and Allstate as to all of the substantive causes of action alleged against them, it follows that Marchesiello is not entitled to any damages, much less punitive damages. We need not address the punitive damage claim, which is rendered moot by our disposition of the remaining claims. (Cf. *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10.)

DISPOSITION

The judgments are affirmed. Respondents shall recover their costs on appeal.

_____
McGuiness, P.J.

We concur:

_____
Siggins, J.

_____
Jenkins, J.

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